No. 84-1717

In The
Supreme Court of the United States
October Term, 1985

UNITED STATES OF AMERICA,
Petitioner,

v.

MICHAEL ROBERT QUINN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

Whether the sole owner of a ship has "standing" under the Fourth Amendment to contest the seizure and resulting search of this vessel because he was the registered and actual owner of the ship, the ship was pursuing the owner's joint venture at the time of the seizure, the particular item seized belonged to the owner of the ship, and reasonable precautions had been taken to preserve the privacy of the ship?

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JUDGMENT BELOW

On January 20, 1984, Mr. Quinn was sentenced to imprisonment for three years, and fined $15,000.00. [J.A. 44] The Court of Appeals' decision remanding this case for a hearing on Mr. Quinn's motion to suppress is reported at 751 F.2d 980.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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STATEMENT OF THE CASE

On August 4, 1983, a four count indictment was returned in the United States District Court for the Northern District of California.[1] (J.A. 18-20) The indictment charged Mr. Quinn with importation of marijuana in violation of 21 U.S.C. Section 952(a); possession with intent to distribute, in violation of 21 U.S.C. Section 841(a)(1); conspiracy to import, in violation of 21 U.S.C. Section 963; and conspiracy to possess with intent to distribute, in violation of 21 U.S.C. Section 846. (J.A. 18-20)

[1]This indictment came about as a result of the testimony of one George Mayberry Hunt. (J.A. 42) Hunt was charged in 1981, for his involvement with others in the importation of 16,000 pounds of marijuana at Bodega Bay, California, which occurred in February 1976. (J.A. 39) After Hunt was extradited from Costa Rica in 1983, he entered into a "plea bargain" with the prosecutor. (J.A. 42) In return for his testimony against Mr. Quinn concerning the alleged 1979 charges, Hunt was permitted to plead guilty and given a probationary sentence. He was then allowed to return to Costa Rica. Both his plea agreement and the terms of his probation require him to return to the U.S. to testify at any trial of Mr. Quinn.

On August 8, 1983, Mr. Quinn was arrested in San Diego while living on board the fishing vessel, *Sea Otter*.[2] The vessel was seized for civil forfeiture proceedings, and Mr. Quinn appeared in San Diego on that same date.[3] After waiving removal hearing, he appeared in San Francisco for arraignment proceedings on September 2, 1983. (J.A. 2)

On October 10, 1983, Mr. Quinn moved to suppress evidence obtained after the Coast Guard stopped, seized and searched his vessel, the *Sea Otter*, in June 1979. (J.A. 25-28) On November 18, 1983, the district court denied this motion for an alleged lack of "standing". (Pet.App. 8a-9a)[4]

Mr. Quinn then entered a conditional plea of guilty to count three of the indictment. (J.A. 11) Pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure, and with the concurrence of the government, Mr.

[2]The register length of the vessel is 54.2 feet; her register breadth is 19.6 feet and her depth 8.7 feet.

[3]These proceedings occurred before a U.S. magistrate in San Diego. During his arraignment, a Federal public defender (appearing for all new arrestees that date) stated that Michael Quinn had been in San Diego living on board the *Sea Otter* since February, and had been working as a commercial fisherman.

[4]The district court judge erroneously thought that Mr. Quinn had "committed the vessel to a charter". (Pet. App. 9a) The government had argued a number of attempted justifications for the Coast Guard's seizure and search, including *inter alia*, 19 U.S.C. Section 1581(a), a "border search" and an "outgoing border search" and had sought to justify the initial stop by California Fish and Game officers as a "regulatory inspection." (J.A. 29-38) The district court never held an evidentiary hearing, made no findings of fact, and never ruled on the merits of the motion.

Quinn specifically reserved for appeal the issue of whether he had "standing" to move to suppress evidence illegally obtained after the seizure of the *Sea Otter* in June 1979. (J.A. 21)

The Court of Appeals reversed the district court, and remanded the case for consideration of the merits of Mr. Quinn's motion to suppress. *United States v. Quinn*, 751 F.2d 980 (9th Cir. 1984) The Court of Appeals held that the conjunction of the following factors conferred a sufficient Fourth Amendment interest to permit litigation of the suppression motion:

(1) Mr. Quinn's ownership of the boat;

(2) his possessory interest in the marijuana seized;

(3) the fact that the boat was pursuing the purpose of his joint venture and thus, he had not relinquished his interest in the *Sea Otter*;

(4) the fact that in order to seize the marijuana, it was necessary for government agents to pump out the forward hold of the boat, indicating that reasonable precautions had been taken to preserve privacy. *Quinn* 751 F.2d 980, 981.

In response to Mr. Quinn's motion to suppress in the district court, the prosecution submitted an unsworn statement of facts together with the affidavit of D.E.A. Agent Wesley Dyckman. (J.A. 29-43)

According to the prosecution statement, in 1978, Mr. Quinn approached George Mayberry Hunt in Costa Rica to participate in a plan to import marijuana by boat from Colombia to Humboldt County, California. The agreed

upon plan called for Hunt to take Mr. Quinn's vessel, obtain a crew for the vessel, pick up a load of marijuana, bring it to Mr. Quinn's ranch in Humboldt County, and return to Mexico with the vessel and crew members. (J.A. 29, 39-40) Mr. Quinn purchased the *Sea Otter*, a fishing vessel, in San Diego, California.[5] (J.A. 29, 39-40)

In the spring of 1979, Michael Quinn entrusted the *Sea Otter* to three South Americans who had been recruited by Hunt. (J.A. 30, 40) The *Sea Otter*, pursuant to the joint venture, took on a load of marijuana off the west coast of Colombia. Mr. Quinn was the owner of this marijuana. The *Sea Otter* proceeded north until it was off the coast of Humboldt County. At that time, pursuant to their previous agreement, Hunt contacted Michael Quinn by radio. The marijuana was subsequently off-loaded at Spanish Flat in the vicinity of Mr. Quinn's ranch. Due to bad weather, the ship was forced to port in Drake's Bay. (J.A. 39-40) At Drake's Bay, California Fish and Game officers boarded the *Sea Otter* purportedly to search for "illegal abalone." No seizure was made at this time, nor was the crew detained. The next morning, the California State officers returned, then left the vessel, and apparently called the Coast Guard. (J.A. 30, 40) Thereafter, Customs Patrol Officers on board the United States Coast Guard cutter *Point Chico* intercepted the *Sea Otter* and boarded it. (J.A. 30) The *Sea Otter* was then located at a point described as 37° 43′ N/ 122° 45′

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[5]The purchase date reflected on the title provided counsel in discovery is February 12, 1979. There is no evidence to dispute that between this date and spring 1979, Mr. Quinn had exclusive custody and control of the vessel.

W approximately twelve miles offshore and four miles south by southwest of the large navigation buoy marking the approach to San Francisco. (J.A. 30) Two Customs officers and one Coast Guard officer then seized the *Sea Otter* and took it to the United States Coast Guard Station at Yerba Buena Island, a distance of approximately 15 miles from the point of seizure. (J.A. 30-31) There, the forward holds of the vessel were pumped out and a small amount of "suspected marijuana" (J.A. 31) was found.[6] Hunt and the other crew members were arrested, but were later released after formal charges were not brought. (J.A. 31) Thereafter, the *Sea Otter* underwent repairs in the San Francisco Bay Area for approximately nine months. (J.A. 31) The *Sea Otter* was turned back over to Mr. Quinn in Punta Arenas, Costa Rica in November, 1981. (J.A. 41)

On August 8, 1983, Michael Quinn was arrested while living on board the fishing vessel *Sea Otter*, in San Diego, California.[7]

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[6]Contrary to the suggestion in the government's brief (p. 24 n.16), no marijuana was ever seized in plain view. The only marijuana was that taken from the holds of the vessel. (J.A. 31, 40-41) Also contrary to the government's assertion, there was never any "fire" on board the *Sea Otter* at any time.

[7]The government has never suggested that anyone other than Mr. Quinn had exclusive custody and control of the vessel between November 1981 and August 8, 1983, the day of Mr. Quinn's arrest.

SUMMARY OF ARGUMENT

A "seizure" is a meaningful interference by government agents with a person's possessory interest in property. A "search" is an infringement by government agents of a reasonable expectation of privacy. "Standing" to contest a seizure is fundamentally distinct from "standing" to contest a search.[8] "Standing" to contest a seizure which invades a property interest is premised on the property interests of the aggrieved party. "Standing" to contest a search depends upon whether the aggrieved party has a reasonable expectation of privacy in the area searched. While ownership of the item seized or the area searched is only one factor to consider in deciding whether one has an expectation of privacy sufficient to contest a search, ownership or possessory interest in the item seized is the determinant of standing to object to a seizure.

In this case, Custom Officers seized Mr. Quinn's vessel. After the seizure, they moved the vessel many miles. During the continued detention of the boat in Coast Guard custody, government agents conducted a search by pumping the holds of the vessel, and seizing a small amount of marijuana. The search in this case was the fruit of the unlawful seizure of the vessel. Under the rule of *Wong Sun v.*

[8]In *Rakas v. Illinois*, 439 U.S. 128 (1978) the Court noted that analysis of issues such as the one in this case requires a determination of whether the disputed search or seizure has infringed an interest of the defendant that the Fourth Amendment was designed to protect. The issue of "standing" is properly one of substantive Fourth Amendment doctrine. *Rakas*, 439 U.S. at 141. Both parties, however, have used the rubric "standing" to discuss the issue of whether, assuming the illegality of the governmental seizure and search in this case, that action infringed Mr. Quinn's Fourth Amendment rights.

United States, 371 U.S. 471, 484-488 (1963), the results of the seizure, assuming its illegality, must be suppressed.

The government's analysis of this case exclusively addresses the issue of the search. In so doing, it ignores the temporal sequence of events, and fails to address the legality of the seizure, which was the prerequisite of the ultimate search.

Mr. Quinn's ownership of the vessel, even exclusive of his proprietary interest in the marijuana seized, gives him standing to contest the legality of the seizure of the vessel. The fact that the vessel was employed in a joint venture and was manned by Mr. Quinn's agents demonstrates that there was no relinquishment or abandonment of his interest in the vessel. The facts show that Mr. Quinn had joint control and supervision of the *Sea Otter* and was in constructive possession of the vessel and its contents.

Because the seizure was the basis for the ultimate search, Mr. Quinn need demonstrate only that he has an adequate property interest which was infringed by the seizure of his vessel. The history of the Fourth Amendment demonstrates a universal recognition of the legal rights of shipowners to contest the legality of the seizure of their vessels.

In any event, these same factors coupled with the fact that the item seized (marijuana) was in a hidden area of the boat, showing that reasonable precautions to preserve privacy had been taken, provide Michael Quinn standing to object to the search of the vessel. Under *Rakas v. Illinois*, 439 U.S. 128, 143-149 (1978), *Rawlings v.*

Kentucky, 448 U.S. 98, 104-106 (1980), and *United States v. Salvucci*, 448 U.S. 83, 91-93 (1980), standing to contest a search as opposed to a seizure, is measured by a multifactor test to determine whether the defendant has a reasonable expectation of privacy in the area searched. Ownership of that area, or a possessory interest in it, is one important factor. Ownership of the item seized, in this case drugs, while not determinative, is also important. The absence of the defendant at the time of the search does not negate standing, especially if the area searched is being used jointly by the defendant and others pursuant to agreement or joint arrangement. Finally, facts demonstrating reasonable efforts to maintain privacy by keeping items from the public view, support standing to object to a search.

Under *United States v. Jeffers*, 342 U.S. 48, 49-50 (1951) and *Bumper v. North Carolina*, 391 U.S. 543, 546-548 (1968), a possessory interest in both the *area searched* and the *items seized* as a result of the search, provides standing to a defendant to contest the legality of the *search*.

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ARGUMENT

I

MR. QUINN'S POSSESSORY INTEREST IN THE VESSEL WAS SUFFICIENT TO CONFER STANDING TO OBJECT TO ITS UNLAWFUL SEIZURE

A "search" occurs when the government infringes a reasonable expectation of privacy. A "seizure" occurs

when the government acts so as to cause a meaningful interference with a person's property interest. *Maryland v. Macon*, 472 U.S. —, 105 S.Ct. 2778, 2782 (1985); *United States v. Jacobsen*, 466 U.S. —, 104 S.Ct. 1652, 1656 (1984); 1 W.LaFave, *Search and Seizure*, Section 2.1(a) at 221-224. The government's argument in this case has confused the concept of "seizure" with that of "search" and has collapsed the analysis to focus exclusively on the search.[9] It fails to recognize that the search was the fruit of the vessel's seizure.

A variety of governmental actions occurred in this case. On two occasions California Fish and Game wardens stopped and boarded the vessel. Officers on board a Coast Guard cutter boarded the vessel. They then seized the vessel, conveyed it many miles, detained it at the Coast Guard facility and conducted a search by pumping out the holds. It was this search which produced the marijuana at issue in the case. Even assuming the validity of the initial boarding by the Coast Guard personnel [cf. *United States v. Villamonte-Marquez*, 462 U.S. 579, 592-

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[9]The government's brief seeks to recharacterize the legal issue in the case. It completely ignores the primacy of the seizure. In the Court of Appeals both parties recognized that the search was secondary to the seizure which preceded it. For example, the question presented in Mr. Quinn's brief before the Court of Appeals was: "Whether defendant MICHAEL ROBERT QUINN had standing to contest the *seizure* and search of the vessel "Sea Otter" in 1979, when he was the owner of the vessel which was *seized* and searched, and the owner of the item *seized?*" (emphasis added) The government's brief in the Court of Appeals stated the issue as: "Whether the district court's ruling, that defendant QUINN did not have standing to contest the *seizure* and search of the Fishing Vessel Sea Otter when he relinquished control of the vessel and its contents to others, was clearly erroneous?" (emphasis added)

593 (1983)], the defendant contests the validity of the *seizure* and *detention* of the vessel. Only as a result of this seizure did the ultimate search occur. If the defendant's Fourth Amendment interests were violated by the *seizure*, the results of the search which flowed from the seizure must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 484-488 (1963); *United States v. Place*, 462 U.S. 696, 707-710 (1983).

The Court has consistently recognized the conceptual distinction between searches and seizures, and the analytically distinct interests that the Fourth Amendment is designed to protect with respect to each. In *Katz v. United States*, 389 U.S. 347 (1967) Justice Stewart, writing for the Court, noted that the Fourth Amendment involves much more than protection against searches of private places:

> . . . In the first place, the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase "constitutionally protected area." Secondly, the Fourth Amendment cannot be translated into a general constitutional "right to privacy." That amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. 389 U.S. at 350.

The Fourth Amendment has often been invoked to challenge the unlawful seizure of the person. *Dunaway v. New York*, 442 U.S. 200, 207 (1979); *Beck v. Ohio*, 379 U.S. 89, 90-91 (1964). Yet a privacy interest is not a prerequisite to object to the unlawful seizure of one's person. In fact, one has no privacy expectation in one's appearance, voice, or physical characteristics systematically

displayed to the public. *United States v. Dionisio,* 410 U.S. 1, 14 (1973). Nonetheless, the Court has repeatedly recognized the distinct right to be free from unreasonable seizures, including seizures of the person. See e.g. *Terry v. Ohio,* 392 U.S. 1, 8-11 (1968); *Florida v. Royer,* 460 U.S. 491, 498-500 (1983). Of course, evidence flowing from an unlawful seizure must be suppressed. *Davis v. Mississippi,* 394 U.S. 721, 724-728 (1969).

An ownership interest alone in the seized property is sufficient in this case to entitle the owner to challenge the validity of the seizure (as opposed to the search) as a basis for seeking the suppression of evidence against him. See *Salvucci,* 448 U.S. at 91 n. 6; *Place,* 462 U.S. at 707-710; *United States v. Lisk,* 522 F.2d 228, 230 (7th Cir. 1975). The proper analysis of this case requires a focus on precisely what government act infringed which Fourth Amendment interest. The facts show that it was a *seizure* which infringed Mr. Quinn's property right in the seized vessel which *led* to the search that uncovered marijuana. The government's brief blithely ignores the seizure to focus exclusively on the ultimate search and defendant's privacy interests.

A. The History Of Vessel Seizures

The history of the Fourth Amendment shows that the Framers had shipowners in mind when providing for protection from improper seizures.[10]

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[10]The Court has looked to history to determine whether "certain types of government intrusion were perceived to be objectionable by the Framers of the Fourth Amendment." *Rakas,* 439 U.S. at 153 (Powell, J., concurring) *United States v. Chadwick,* 433 U.S. 1, 7-9 (1977).

Under Charles I, Parliament levied a tax on poundage and tonnage of sea vessels. To enforce the Act, the Privy Counsel extended the right to all the King's messengers to enter onto any vessel. This became known ultimately as the "writ of assistance".[11] In 1696, William III made like powers available to British officers in America.[12] Though the writs permitted search of land structures in daytime, Customs officers in the American colonies could search any vessel day or night to detect if taxes were owed, and later on, to search for smuggled goods.[13]

Thirty years later, the passage of the Molasses Act increased the use of writs of assistance by Customs officers who searched and seized vessels which smuggled goods.[14] In 1761, *Paxton's Case* was brought after sixty-three Boston merchants, some of them shipowners, petitioned the court for an end to the writs of assistance.[15] James Otis' eloquent but unsuccessful presentation in this case led John Adams to comment:

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[11]William Holdsworth, *History of the English Law* (3rd Ed., London 1926) Vol. VI, p. 70 fn 42; Paul de Raypin-Thoyras, *History of England* (London, 1747), II, p. 285.

[12]The statute of 7 and 8, William III, ch. 22 Sec. 6 (1696).

[13]Claude A. Van Tyne, *Causes of the War of Independence,* Vol. III, pp. 3-5, 93, 95, 114. William B. Weeden, *Economic and Social History of New England* (Boston, 1890), II, p. 671.

[14]William S. McClellan, *Smuggling in the American Colonies* (New York, 1912), p. 43.

[15]Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (New York, 1935), p. 57.

> Then and there was the first scene of opposition to the arbitrary claims of Great Britain. Then and there the child independence was born.[16]

During the same year as *Paxton's case*, the case of *Ewing v. Cradock* arose.[17] The plaintiff in this action was the owner of a ship and cargo which had been seized for violation of the revenue laws. The ship had been libelled in the admiralty court in a forfeiture action. With the permission of the admiralty court, the owner of the ship had agreed to pay half the value of the property in exchange for its return. The shipowner then sued the collector in trespass for the wrongful seizure of his ship. This case is significant because it reflects one of the first colonial challenges to the unlawful seizure of a vessel, although the action was technically noted to be in trespass. The plaintiff was the owner of the ship which had been seized.

The smuggling in the Colonies was not deterred by the seizure of vessels and continued up until after the passage of the Stamp Act in 1765. At that time, the writs of assistance were still being executed by Customs officers. In 1763, another order came from England for the stricter enforcement of the Customs and Molasses Act laws. The crown adopted the effective expedient of directing the commanders of all ships on the American coast to act as officers of the customs and to seize all vessels and cargoes thought to be in violation of the Molasses Act.[18]

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[16]*Works of John Adams*, Vol. X, pp. 247-48.

[17]Josiah Quincy, *Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay*, 1761-1772 (Boston, 1865), pp. 402-408.

[18]McClellan, p. 82.

In 1764, after the conclusion of the Seven Year War, England needed additional financing. As a result, The Sugar Act of 1764, was passed which placed a less unreasonable duty on the importation of sugar and molasses. This Act was rather ineffective in that the colonists had already become accustomed to the smuggling of molasses and sugar without paying any taxation or duties. Even though this tax was a lesser amount, the American colonies still resisted payments.[19] At Newburg's, for example, a seizure of molasses at sea was rescued by colonists in half a dozen one-man boats. The boats went after the customs officer, took the goods from him and the boat he was in, and left him to stay the night on the beach.[20]

In 1768, a riot resulted when officials seized John Hancock's sloop, *Liberty* under a writ of assistance for landing Madeira wines without payment of duty. The sloop was taken out and anchored under the guns of a man-of-war in the harbor. A riot occurred because of the violence of the seizure and the crowd's belief that the seizure made at sunset was illegal due to their erroneous impression that the restriction in the writ of assistance to daytime search of buildings applied to vessels as well.[21]

The *Liberty* was later adjudged forfeit in the Admiralty Court and the ship was bought by the collector of Boston. The collector used the vessel as a coast guard

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[19]Id. at pp. 72-93.

[20]Lasson, p. 68.

[21]Quincy, 1761-1772, pp. 456-464; Hunt, *Political History of England*, Vol. X, pp. 88-89.

until 1769 when a Newport mob, provoked by the *Liberty's* seizure and that of other vessels on unfounded suspicions and by the crew's insolence, scuttled and burned the ship.[22]

Many of the riots and acts of independence antecedent to the Revolution occurred as a result of the customs officers' use of the general writs of assistance to seize and search vessels. The Fourth Amendment is recognized to be a direct result of these unlawful searches and seizures and the abuses imposed by the British customs officers.[23] By enacting the Fourth Amendment, the Framers of the Constitution intended to protect shipowners, among others, from the wrongful seizure and search of their vessels. It should be noted that many of the members at the Federal convention had vested interests in shipping and trading.[24]

Early cases interpreting the Constitution dealing with vessels show that shipowners were one of the specific class of individuals intended to be protected by the Fourth Amendment. In the case of *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804),[25] a shipowner sued a naval captain

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[22]Lasson, p. 72.

[23]Joseph J. Stengel, *The Background of the Fourth Amendment to the Constitution of the United States*, 3 University of Richmond Law Review, pp. 293-298 (1969).

[24]Charles A. Beard, *Economic Interpretation of the Constitution of the United States* (1935), pp. 41, 151.

[25]At that time Congress had passed a statute making it unlawful for American ships to travel to French ports. The Act authorized the seizure of all ships suspected of violating this law. The President then expanded upon this statute and ordered the seizure of American ships traveling to or from French ports. An American vessel acting pursuant to the President's orders seized a ship traveling from a French port. The ship was acquitted and the shipowner sued the naval captain for trespass.

for trespass and the seizure of his vessel. This suit by the ship's owners for trespass was in essence a suit for recompense for the unlawful seizure of the vessel.

In the case of *The Appollon*, 22 U.S. (9 Wheat) 362, 363 (1824), the owner and master of a ship sued for damages resulting from the unlawful seizure of his vessel.[26] See also, *Otis v. Bacon*, 11 U.S. (7 Cranch) 589 (1813); *Otis v. Watkins*, 13 U.S. (9 Cranch) 339, 353 (1815); *Gelston v. Hoyt*, 16 U.S. (3 Wheat) 246, 305 (1818). *All* of these cases show that historically the shipowner was entitled to contest the legality of the seizure of his vessel at sea, whether or not he was present on the vessel at the time of seizure. Historically shipowners were recognized as one of the classes of individuals protected by the Fourth Amendment. The Fourth Amendment should not at this juncture be construed to deprive a shipowner of standing to contest the legality of the seizure of his vessel.

B. Michael Quinn's Ownership Interest

The government seems to acknowledge that Mr. Quinn's ownership of the seized vessel entitles him to challenge the validity of the seizure in this case. (G.B. p. 20 n. 11) It argues, however, that there was an "abandonment" which precludes a valid assertion of ownership as a basis to challenge the seizure (Id.) Mr. Quinn cannot be held to have abandoned any interest in the vessel. He was the person who had both actual ownership and legal

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[26]Federal officers had seized the ship on the suspicion of smuggling. A condemnation action was brought and the ship was acquitted. The shipowner then sued the officers for damages resulting from the unlawful seizure of the vessel. The defense at that time to the action was that there was probable cause for the seizure.

title to the vessel.[27] At no time did he ever evidence any intent to relinquish the property [cf. *Abel v. United States*, 362 U.S. 217, 240-241 (1960)], nor could the entrustment of the vessel to Hunt, his co-venturer, fairly be construed as a relinquishment of his property interest in the *Sea Otter*. This entrustment took place within the ambit of their mutual agreement to use the vessel. Their agreement did not divest Quinn of his interest, but indicated mutual and joint control, and constructive possession by Quinn. Use of property pursuant to joint venture or agreement maintains the owner's interest in the property. *United States v. Little*, 735 F.2d 1049, 1052-1054 (8th Cir. 1984) *rev'd on other grounds* 743 F.2d 1261, *cert. denied* Nos. 84-1122 and 84-1126 (February 19, 1985); *United States v. Pollock*, 726 F.2d 1456, 1465 (9th Cir. 1984); *United States v. Freire*, 710 F.2d 1515, 1519 (11th Cir. 1983); *United States v. Perez*, 700 F.2d 1232, 1236 (8th Cir. 1983); *United States v. Perez*, 689 F.2d 1336, 1338 (9th Cir. 1982) The seizure of the vessel while it was going about his business implicated Quinn's possessory interest. His absence at the time of the seizure does not preclude his objection, for the owner of property may assert an objection to the seizure of that property even if it is temporarily out of his physical possession. *United States v. Haes*, 551 F.2d 767, 769-770 (8th Cir. 1977) (owner of films who directed employees to mail them to theaters pursuant to lease agreement had standing to contest the seizure of films by transport service); *United States v. Wilson*, 536 F.2d 883, 885 (9th Cir. 1976) (defendant has standing if he entrusts belongings to companion for storage in companion's bags); *United States v. Kelly*,

[27]The government acknowledged this in the stipulation for civil forfeiture of the *Sea Otter*, which noted that Mr. Quinn's "sole interest" in the vessel had been verified. (J.A. 50)

529 F.2d 1365, 1369-1370 (8th Cir. 1976) (bookstore proprietor had standing to object to warrantless FBI seizure of books and magazines addressed to him, when seized from common carrier); *United States v. House*, 524 F.2d 1035, 1042 (3rd Cir. 1975) (no question of an owner's standing to object to a *seizure* of his property without consent and without the benefit of any process, even when a third party has temporary possession of that property. Owner had given tax records to accountant); *United States v. Canada*, 527 F.2d 1374, 1378 (9th Cir. 1975) (owner of suitcase had standing to contest search and seizure even though actual custody of suitcase had been given to her companion who also shared access to it); *United States v. Mulligan*, 488 F.2d 732, 736-737 (9th Cir. 1973) cert. denied 417 U.S. 930 (1974) (car owner could object to its search though he had no control over the car when it was searched, had registered it under a fictitious name and had parked it in an acquaintance's driveway for over two months); *United States v. Lonabaugh*, 494 F.2d 1257, 1262 (5th Cir. 1973) (owner of suitcase had standing to contest its seizure and search even though baggage had been given to airline personnel and baggage checks given to companion at time of seizure); *United States v. Eldridge*, 302 F.2d 463, 464-465 (4th Cir. 1962) (owner of car had standing to contest search even though he had given keys and permission to friend to use car on day of search).

Nor does the fact that it was Mr. Quinn's co-venturers and agents who were on the boat when it was seized divest him of his property interest. In *United States v. Schaefer, Michael and Clairton*, 637 F.2d 200 (3rd Cir. 1980), the president of a corporation and owner of the trucks which delivered the company's products objected

to the seizure of five trucks which were stopped while being driven by employees. The court held that Schaefer as owner of the trucks and Clairton Slag, as the corporation with a possessory interest the time of the seizure, both had standing to object to the trucks' seizure. The entrustment of the trucks to drivers (as employees or agents) did not divest Schaefer or the corporation of their possessory interests or preclude assertion of a Fourth Amendment objection to the seizures. *Schaefer*, 637 F.2d at 203.

The government's position erroneously suggests that presence at the time of the seizure is the *sine qua non* for the valid objection to a seizure of property. This Court has repeatedly ruled otherwise. In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) the defendant objected to the seizure of his car from the driveway in front of his home. At the time of the seizure he was miles away, and in custody. 403 U.S. at 447. This was no legal impediment to his valid objection to the seizure. In *Alderman v. United States*, 394 U.S. 165 (1969) the owner of the property where illegally intercepted conversations were seized, had standing to object to their seizure, "whether or not he was present or participated in those conversations." 394 U.S. at 176.

The forcible seizure and detention of the vessel *Sea Otter* which led to the search, infringed the shipowner's possessory interests. He should have been permitted to litigate his Fourth Amendment claim on its merits.

II

THE CONJUNCTION OF FACTORS IN THIS CASE ALSO GAVE MR. QUINN A REASONABLE EXPECTATION OF PRIVACY

Because the search in this case was the fruit of an earlier unlawful seizure, expectation of privacy in the area searched need not be established for Quinn to seek suppression of the small amount of marijuana seized. The facts show Mr. Quinn to have had such an expectation in any event. The government has engaged in a casuistical dissection of each of the factors set forth in the Court of Appeals' opinion. (G.B. 13-24) The government complains that each factor in this case is in and of itself insufficient. (G.B. 13-24) The combination of factors in this case clearly constitute a showing of a reasonable expectation of privacy, which was infringed by the search.

A. Ownership Of The Place Searched And Item Seized

First, Mr. Quinn was the owner of the boat which was the place searched. Because of his relationship with those on board, he was in constructive possession of the boat and its contents. Ownership is a "bright star" by which courts have been guided. *United States v. Freire*, 710 F.2d 1515, 1519. (11th Cir. 1983) Ownership of the place searched is an important factor in determining standing to object to a search. See, *Rakas*, 439 U.S. at 148; *Salvucci*, 443 U.S. at 90 n.5.

The government has suggested that the fact the *Sea Otter* was not used by Mr. Quinn for a two year period after the seizure should be considered in the "standing" analysis (G.B. 8). A more appropriate analysis focuses

on the proprietary and possessory interests of the movant up to and including the time of the seizure of the property. The subsequent disposition of property in response to an unlawful seizure is clearly not appropriately considered in determining valid Fourth Amendment interests. *Walter v. United States,* 447 U.S. 649, 658 n. 11 (1980); *United States v. Newman,* 490 F.2d 993, 995 (10th Cir. 1974). In any event, Mr. Quinn did retake the vessel, was arrested while living on the vessel, and was the only person in the world to have an interest in the vessel.

Second, Mr. Quinn was the owner of the item seized, the marijuana. The Court has recognized that ownership of the item seized, while not determinative, is relevant and important on the issue of whether the owner has a reasonable expectation of privacy in the area searched. In *Rawlings,* the Court held that defendant's ownership of the drugs was "undoubtedly" one fact to be considered in the case 448 U.S. at 105. In *Rakas* the court found no standing because petitioners failed to allege *inter alia,* an interest in the property seized. 439 U.S. at 148. In this regard, the government makes two objections. First, it contends that Quinn can have no interest in a "*de minimus*" quantity of marijuana (G.B. p. 19 n. 9) Second, the government contends that no one can have an interest in contraband for Fourth Amendment purposes. (G.B. 22-23) In arguing the "*de minimus*" point, the government simply misconstrues *United States v. Jacobsen,* 466 U.S. —, 104 S.Ct. 1652 (1984). *Jacobsen* held that since government agents had already legitimately seized a large quantity of cocaine, the destruction of a trace amount in a chemical test did not infringe any additional Fourth Amendment interest. *Jacobsen does not* make Fourth Amendment protections hinge on the amount or size of the item seized.

In arguing that one's interest in contraband cannot be considered to determine standing, the government again confuses a privacy interest with a possessory one, and argues in the face of repeated holdings of this Court to the contrary. Of course, one cannot have a reasonable expectation of privacy in contraband which is in plain view. *Texas v. Brown,* 460 U.S. 730, 738 (1983). *United States v. One 1977 Mercedes Benz,* 708 F.2d 444, 448 (9th Cir.). The issue here, however, is whether the possessory interest of a defendant in contraband seized as a result of a search is relevant as a consideration to determine whether that defendant has a privacy interest to allow an objection to the search that uncovered the contraband. In *Rawlings* this Court held that, while not conclusive on the issue, Rawlings' "ownership of the drugs is undoubtedly one fact to be considered" in determining whether he had a reasonable expectation of privacy in the place searched. 448 U.S. at 105. In *Trupiano v. United States,* 334 U.S. 699 (1948), the government sought to justify a warrantless seizure of property (a still) on the grounds that it was contraband. The Court ruled:

> The fact that they actually seized only contraband property, which would doubtless have been described in a warrant had one been issued, does not detract from the illegality of the seizure. See *Amos v. United States,* 255 U.S. 313; *Byars v. United States,* 273 U.S. 28; *Taylor v. United States, supra* (286 U.S. 1) 334 U.S. at 707.

In *United States v. Jeffers,* 342 U.S. 48 (1951) this Court rejected the same argument the government makes here. After the government urged that the Congressional

determination that "no property rights shall exist" in contraband goods meant that no property rights "within the meaning" of the Fourth Amendment, exist in the narcotics seized, the Court held:

> We are of the opinion that Congress, in abrogating property rights in such goods, merely intended to aid in their forfeiture and thereby prevent the spread of the traffic in drugs rather than to abolish the exclusionary rule formulated by the courts in furtherance of the high purposes of the Fourth Amendment. See *In re Fried*, 161 F.2d 453 (1947). Since the evidence illegally seized was contraband, the respondent is not entitled to have it returned to him. It being his property, for purposes of the exclusionary rule, he was entitled on motion to have it suppressed as evidence on his trial. 342 U.S. at 53-54.

The Courts of Appeals have consistently recognized that ownership of the item seized is relevant to a determination of the right to object, regardless of the contraband nature of the item. See, *United States v. Fahnbulleh*, 748 F.2d 473, 477 (8th Cir. 1984) (ownership of cocaine to be considered); *United States v. Bachner*, 706 F.2d 1121, 1126 (11th Cir. 1983) (actual or constructive possession of quaaludes is a factor to be considered); *United States v. Brock*, 667 F.2d 1311, 1320 (9th Cir. 1982) (ownership of contraband is a factor to consider); *United States v. Haydel*, 649 F.2d 1152, 1155 (5th Cir. 1982) (ownership of gambling records to be considered).

Two of the factors in this case, a possessory interest in the place searched, and in the item seized, give Quinn standing to object to the search. In *United States v. Jeffers*, the Court held that Jeffers' interest in the hotelroom searched, coupled with his ownership of the cocaine

seized, gave him a legitimate basis to contest the search of the room which uncovered contraband. 342 U.S. at 50-51. In *Bumper v. North Carolina*, 391 U.S. 543, 544, 546-548, (1968) the Court found that Bumper's interest in both the house searched and the rifle seized permitted him to object to the search.

In *Rakas*, the Court noted that *Jeffers* and *Bumper* premised standing on the possessory interest in "both the premises searched and the property seized" 409 U.S. at 136. The Court cited *Jeffers'* holding again in *Salvucci*, 448 U.S. at 90 n.5. The rule of *Jeffers*, which was approved in *Rakas* and *Salvucci*, that a possessory interest in *both* the premises searched and the item seized confers standing to object to the search of the premises which led to the seizure of the item, is applicable here. Given Mr. Quinn's dual interests in both the place searched and the property seized, he has standing to contest the search in this case.

The Court of Appeals considered the effect of two additional factors: the private location of the item seized, and the relationship of those on the boat to Mr. Quinn.

B. Location Of The Item Seized

The marijuana in this case was concealed, indicating that reasonable precautions had been taken to preserve privacy.[28] In *United States v. Chadwick*, 433 U.S. 1, 11 (1977), the Court ruled that by placing personal effects inside a double-locked footlocker, the defendants had mani-

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[28]Not only was the marijuana not in plain view; it could only be located after the forward holds were pumped out, and the water was apparently strained.

fested an expectation that the contents would remain free from public examination no less than one who locks the doors of his home against intrusion. While a subjective expectation of privacy is not conclusive in itself, it is a relevant and important consideration. In *Katz* the Court discussed Katz's efforts to maintain privacy of his conversations by closing the phone booth. What a person knowingly exposes to the public is not a subject of Fourth Amendment protection; but what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. *Katz*, 389 U.S. at 35. See also, *Rios v. United States*, 364 U.S. 253, 255 (1960); *Ex parte Jackson*, 96 U.S. 727, 733 (1877).

C. Joint Use Of The Property

Finally, the nature of the use of the property in the joint venture is relevant to the determination of Fourth Amendment protection. In this case Michael Quinn's absence at the time of the search does not preclude determination of the merits of his suppression claim because where a joint venture is being pursued, the mere fact of the joint venturer's absence from the place searched is insufficient to establish abandonment of the property seized. *Quinn*, 751 F.2d at 981. This analysis of the relation of the parties to the property is precisely in accordance with *Rawlings*, in which the Court engaged in a lengthy examination of Rawlings' relation to Vanessa Cox to determine whether he preserved a privacy interest in her purse, 448 U.S. at 105. Given the precipitious nature of the bailment, and Cox's far from enthusiastic acceptance, the Court held that Rawlings did not have standing. In this case, by contrast, Hunt was present on the boat with Mr. Quinn's

agreement, pursuing their joint plan. He was on the boat only because of this agreement with Quinn, and was going about their mutual business at the time of the seizure and search.[29] When a defendant enters into an arrangement that indicates joint control and supervision of the place searched, he may challenge the search of that place. *Little*, 735 F.2d 1049, 1052-1054 (8th Cir. 1984) *rev'd on other grounds* 743 F.2d 1261, *cert. denied* Nos. 84-1122 and 84-1126 (February 19, 1985); *Pollock*, 726 F.2d 1456, 1465 (9th Cir. 1984); *Perez*, 700 F.2d 1233, 1236 (8th Cir. 1983); *Perez*, 689 F.2d 1336, 1338 (9th Cir. 1982). Here the boat was proceeding to its location pursuant to the agreed plan. Of course, Quinn derives no special standing or benefit from the mere fact of Hunt's status as co-conspirator. But if the evidence shows, as it did, a mutual or joint interest in property or its use, then this is a relevant factor to determine expectation of privacy, but more importantly, to show that absence of defendant at the time of the search does not constitute abandonment or relinquishment. Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized or permitted by society. *Rakas*, 439 U.S. at 143

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[29]Indeed, because of their joint venture, Mr. Quinn was constructively in possession of both the boat and marijuana at the time of their seizure. The law recognizes two kinds of possession, "actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and intention, at a given time, to exercise dominion or control over a thing, either directly or *through another person or persons*, is then in constructive possession of it." Devitt and Blackmar, Federal Jury Practice and Instructions (3rd ed.) Section 16.07 (emphasis added)

n.12.[30] Just as Jeffers' Fourth Amendment interest derived in part from his relationship and understanding with his aunt whose hotel room he used, and Bumper's standing derived in part from the understanding he had with his grandmother concerning his rights in her house, here, the agreement and understanding between Hunt and Quinn shows no relinquishment by Quinn, but a continued use pursuant to Quinn's purpose, of the Sea Otter.

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[30]In this regard, a Court of Appeals opinion recently observed:

> Obviously, the word "legitimate" in the phrase "legitimate expectation of privacy" is being used in a special sense. An agreement to use an airplane to transport illegal drugs, and an undertaking to guard the plane to prevent detection, are by no means legitimate. The cases must be analyzed on the hypothesis that no illegal activity is occurring or contemplated. The illegality comes to light only through execution of the warrant or court order whose validity is the very point at issue. Otherwise Fourth Amendment analysis would be pointless, because motions to suppress are never made in the first place unless evidence of criminality has been seized. So the "expectation" that must be taken as a predicate for analysis in this case is the expectation of any innocent person who has arranged with an owner or lessee to use an airplane. *United* v. *Little*, 735 F.2d at 1052 (8th Cir. 1984) *rev'd on other grounds* 743 F.2d 1261, *cert. denied* Nos. 84-1122 and 84-1126 (February 19, 1985).

CONCLUSION

Respondent respectfully requests that the Court affirm the judgment of the Court of Appeals and remand this case to the district court for an evidentiary hearing and a ruling on the merits of the motion to suppress.

Respectfully submitted,

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